Josu Engineering Construction Sdn Bhd v TSR Bina Sdn Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO N-02-417–02 OF 2013
MOHD HISHAMUDIN, ZAWAWI SALLEH AND UMI KALTHUM JJCA
4 MARCH 2015

Civil Procedure — Appeal — Appellate intervention — Whether insufficient judicial appreciation of evidence — Whether proper case for appellate intervention — No reason given by trial judge for decision — No analysis or discussion of evidence — Whether trial judge erred in dismissing plaintiff's claim and allowing defendant's counterclaim — Pleadings and evidence misapprehended — Failure to appreciate and consider evidence — Erroneous decision inconsistent with contemporaneous documentary evidence — Whether appellate intervention required

Contract — Building contract — Claim for work done — Works completely executed by plaintiff — Whether defendant's allegations of uncompleted works unfounded

The defendant/respondent was the main contractor for a project to upgrade the Port Dickson Polytechnic ('the project'). The defendant employed the plaintiff/appellant as subcontractor under an earthworks subcontract and a site office subcontract. The plaintiff in this suit claimed payment for works carried out in respect of the subcontracts. The defendant counterclaimed for alleged outstanding balance earthworks left undone by the plaintiff and for the alleged removal of construction debris and wastes and/or earth from neighboring owner Matrix Concept's land which the defendant alleged was dumped by the plaintiff onto Matrix Concept's land. The learned High Court judge ('the judge') after full trial dismissed the plaintiff's claim and allowed the defendant's counterclaim. The plaintiff claimed that the judge did not make any specific finding of fact in regard to the site office subcontract. There was no reason given for the decision and no analysis or discussion of evidence was done by the judge. The plaintiff thus appeal against the whole decision of the judge.

Held, allowing the plaintiff's appeal with costs:

(1) The judge had clearly erred when he totally dismissed the plaintiff's claim and allowed the defendant's counterclaim in respect of the site office subcontract. The judge had misapprehended the pleadings and the evidence adduced, had failed to appreciate and consider the evidence and had made an erroneous decision which was inconsistent with the

contemporaneous, unchallenged documentary evidence and which also had contradicted the defendant's own admission/concession. This was a case where appellate intervention was required. The order of the High Court in respect of the site office subcontract was set aside and substituted with an order that the defendant pay the plaintiff the sum of RM87,502.07 (see paras 17–18 & 20).

(2) In respect of the earthworks subcontract, the judge failed to appreciate and consider the evidence adduced. For if he had done so he would have clearly seen that the earthworks executed by the plaintiff was 169,214 cubic meters and not, as contended by the defendant, 65,075 cubic meters. Accordingly the plaintiff's claim under this head was allowed (see para 28).

(3) The plaintiff had completely executed the earthworks as per the earthworks subcontract. The judge failed to appreciate the facts as alluded to by the plaintiff and in failing to do so he had misdirected himself to such an extent as to find that the defendant's counterclaim was valid. As the plaintiff had completed the earthworks under the earthworks subcontract, and that the so-called balance works allegedly not done by the plaintiff were different from that complained by the defendant in terms of type, description, location and quantity, there can be no counterclaim under this head by the defendant against the plaintiff (see paras 34 & 36).

(4) There were overwhelming evidence which pointed to the fact that the plaintiff could not have transported 41,220 cubic meters of earth out of the Polytechnic site and dump them on Matrix Concept land. The judge had failed to fully appreciate the evidence tendered in court. The judge was wrong to have allowed the defendant's counterclaim under this head of claim (see para 42).

[Bahasa Malaysia summary

Defendan/responden adalah kontraktor utama bagi projek meningkatkan Politeknik Port Dickson ('projek'). Defendan mengambil plaintif/perayu sebagai subkontraktor di bawah subkontrak kerja tanah dan subkontrak tapak pejabat. Plaintif dalam tindakan ini menuntut bayaran untuk kerja yang dijalankan berkaitan subkontrak tersebut. Defendan menuntut balas untuk jumlah tertunggak yang didakwa bagi kerja tanah yang tidak dibuat oleh plaintif dan untuk pemindahan serpihan-serpihan dan buangan pembinaan yang didakwa dan/atau tanah daripada pemilik jiran, tanah Matrix Concept yang mana defendan mendakwa telah dibuang oleh plaintif ke atas tanah Matrix Concept. Hakim Mahkamah Tinggi yang bijaksana ('hakim') selepas perbicaraan penuh menolak tuntutan plaintif dan membenarkan tuntutan balas defendan. Plaintif mendakwa bahawa hakim tidak membuat dapatan spesifik fakta berkaitan subkontrak tapak pejabat. Tidak terdapat alasan yang

diberikan untuk keputusan dan tiada analisa atau perbincangan terhadap keterangan dibuat oleh hakim. Plaintif oleh itu merayu terhadap keseluruhan keputusan hakim.

Diputuskan, membenarkan rayuan plaintif dengan kos:

(1) Hakim telah dengan jelas tersilap apabila beliau menolak keseluruhan tuntutan plaintif dan membenarkan tuntutan balas defendan berkaitan subkontrak tapak pejabat. Hakim telah salah faham terhadap pliding dan keterangan yang dikemukakan, telah gagal untuk menghargai dan mempertimbangkan keterangan dan telah membuat keputusan yang salah yang mana tidak konsisten dengan keterangan dokumentar semasa, tidak dicabar dan yang mana juga telah menyangkal pengakuan/kompromi defendan sendiri. Ini adalah kes di mana campur tangan mahkamah rayuan diperlukan. Perintah Mahkamah Tinggi berkaitan subkontrak tapak pejabat diketepikan dan diganti dengan perintah bahawa defendan membayar plaintif jumlah sebanyak RM87,502.07 (lihat perenggan 17–18 & 20).

(2) Berkaitan subkontrak kerja tanah, hakim gagal untuk menghargai dan mempertimbangkan keterangan yang dikemukakan. Kerana jika dia telah berbuat demikian dia akan melihat dengan jelas kerja tanah yang dilaksanakan oleh plaintif adalah 169,214 meter padu dan bukan, seperti yang dihujahkan oleh defendan, 65,075 meter padu. Oleh itu tuntutan plaintif di bawah tuntutan ini dibenarkan (lihat perenggan 28).

(3) Plaintif telah melaksanakan secara penuh kerja tanah seperti yang dikehendaki oleh subkontrak kerja tanah. Hakim gagal untuk menghargai fakta seperti yang ditunjukkan oleh plaintif dan dalam gagal berbuat sedemikian beliau telah salah arah diri sehingga mendapati tuntutan defendan adalah sah. Memandangkan plaintif telah menyiapkan kerja tanah di bawah subkontrak kerja tanah, dan baki kerja yang didakwa tersebut yang tidak dilakukan oleh plaintif adalah berbeza daripada yang diadukan oleh defendan dalam terma jenis, deskripsi, lokasi dan kuantiti, tidak patut terdapat tuntutan balas di bawah tuntutan ini oleh defendan terhadap plaintif (lihat perenggan 34 & 36).

(4) Terdapat keterangan yang kukuh yang mana mengarah kepada fakta bahawa plaintif mungkin tidak memindahkan 41,220 meter padu tanah daripada tapak Politeknik dan membuangnya ke atas tanah Matrix Concept. Hakim telah gagal untuk menghargai sepenuhnya keterangan yang dikemukakan di mahkamah. Hakim adalah salah untuk membenarkan tuntutan balas defendan di bawah tuntutan ini (lihat perenggan 42).]]]

Notes

For cases on appeal in general, see 5(1) *Mallal's Digest* (5th Ed, 2015) paras 837–1025.

For cases on claim for work done, see 3(3) *Mallal's Digest* (5th Ed, 2015) paras 3925–3943.

Cases referred to

Aseambankers Malaysia Bhd & Ors v Shencourt Sdn Bhd & Anor [2014] 4 MLJ 619; [2014] 2 CLJ 773, CA (refd)

Choo Kok Beng v Choo Kok Hoe & Ors [1984] 2 MLJ 165b, PC (refd)

Chow Yee Wah & Anor v Choo Ah Pat [1978] 2 MLJ 41b, PC (refd)

Guobena Sdn Bhd v New Civilbuild Pte Ltd [2002] 3 SLR 533, CA (refd)

Ming Holdings (M) Sdn Bhd v Tuan Syed Azahari bin Noh Shahabudin & Anor [2010] 4 MLJ 577, FC (refd)

Tan Kuan Yau v Suhindrimani [1985] 2 MLJ 22, SC (refd)

Appeal from: Civil Suit No 22–74 of 2013 (High Court, Seremban)

GH Tee (WSW Davidson, N Rajentharan and Soh Jing Han with him) (GH Tee & Co) for the appellant.

Ben Chan (Norashikin bt Amirruddin with him) (Mah-Kamariyah & Philip Koh) for the respondent.

Umi Kalthum JCA:

[1] The appellant is appealing against the whole decision of the learned High Court judge dated 16 January 2013 after full trial. The learned High Court judge had dismissed the appellant's claim against the respondent and had allowed the respondent's counterclaim against the appellant.

[2] For ease of reference we will refer the parties as in the High Court suit wherein the appellant was the plaintiff and the respondent was the defendant.

FACTS

[3] The undisputed facts are as follows:

(a) the defendant was employed by the Government of Malaysia/Jabatan Kerja Raya ('JKR') as the main contractor for the project known as Upgrading of Existing Port Dickson Polytechnic, Port Dickson, Negeri Sembilan ('the project');

(b) by two separate subcontracts, the defendant employed the plaintiff as subcontractor for the following parts of the construction works in the project:

(i) subcontract for earthworks dated 2 January 2002 ('earthworks subcontract') at a particular portion of the site and for 6,850 cubic meters of earth at the rate of RM2.30 per cubic meter, or a total subcontract sum of RM15,755; and

(ii) subcontract for permanent JKR site office and temporary site office dated 30 January 2002 ('site office subcontract') for a subcontract sum of RM185,000;

(c) in the suit the plaintiff claimed:

(i) in respect of the earthworks subcontract:

(1) RM270,625.13 as the value of earthworks done but not paid;

(2) RM8,726.97 as release of the first moiety of retention money; and

(3) interests thereon;

(ii) in respect of the site office subcontract:

(1) RM89,811.09 as value of works done but not paid;

(2) RM6,789.50 as release of first moiety of retention money; and

(3) interests thereon;

(d) in the suit, the defendant counterclaimed:

(i) in respect of the earthworks subcontract, RM666,820 comprising of RM295,840 for completing the plaintiff's works and RM370,980 for clearing the debris allegedly dumped by the plaintiff onto the neighbouring land of Matrix Concept Sdn Bhd ('Matrix Concept'); and

(ii) in respect of the site office subcontract, RM10,000 for clearing works done by Global Season Sdn Bhd ('Global Season').

BEFORE US

Site office subcontract

[4] As the issues, facts and evidence in respect of the site office subcontract are simpler and shorter, the plaintiff had submitted on it first. We agree with this approach.

[5] It was submitted by the plaintiff that the learned High Court judge did not make any specific finding of fact in regard to the site office subcontract other than to state at para 34.2 of his grounds of judgment:

34.2 Pihak defendan telah menanggung kos tambahan dan mengalami kerugian dengan melantik subkontraktor lain bagi menyempurnakan kerja-kerja tanah dan kerja-kerja tapak pejabat JKR.

There was no reason given for this decision and no analysis or discussion of evidence was done by the learned High Court judge.

[6] Witnesses for both parties had confirmed that the original scope of works for the site office subcontract was RM185,000 and that this original scope was completed by the plaintiff. This left of items of works in dispute are in regard to the variation works. The parties' respective amounts for the variation works are as follows:

Item of variation	Plaintiff's figure (RM)	Defendant's figure (RM) [as per para 19, amended statement of defence (p 61, ACOB) and DW1's witness statement (p 112, ACOB)]
(1) Change from timber windows to aluminium windows	3,215.68	2,894.11
(2) Change of terrazo floor tiles to porcelain granite tiles	56,524.30	16,891.18
(3) Mild steel gate (backyard)		960
(4) Septic tank OKA	3,600	2,200
(5) Additional electrical and external water supply works	13,405	Not assessed by the defendant. No rebuttal evidence by the defendant.
(6) Upgrading of architecture finishes	4,518.66	Not assessed by the defendant. No rebuttal evidence by the defendant.

[7] In respect variation items 1, 3 and 4 above, the plaintiff adopted the figures as admitted by the defendant in its amended statement of defence, para 19 and DW1's witness statement Q&A 19.

Item 2

[8] As for variation item 2, change of terrazzo floor tiles to porcelain granite tiles, it was submitted that JKR in its final account on the project ('P74') had certified and paid RM110,500 (see pp 442–448, especially p 445, ACOB) to the defendant for this variation executed by the plaintiff on its behalf. Yet the

defendant had acted oppressively and/or unreasonably by grossly undervaluing the plaintiff's value for this variation work at a mere RM16,891.18 of what the defendant had received from the government/JKR for this variation work. It was the plaintiff's contention that the learned High Court judge had failed to consider the material evidence in the final account in P74. P74 was a contemporary document issued by an independent party and which was unchallenged by the defendant. It was prepared by the government/JKR and signed and agreed to by the defendant.

Item 5

[9] As for variation item 5, additional electrical and external water supply works, the plaintiff had proposed an amount of RM13,405 for this variation work by letter dated 30 April 2002 (exh P4, p 301, ACOB). As there was no contemporaneous document from the defendant to deny this item or its amount, neither did the defendant dispute this amount, it was contended by the plaintiff that the defendant had accepted the said item and amount, especially seeing that the defendant did not give evidence as to the reasonable amount for this variation at trial.

Item 6

[10] As for variation item 6, upgrading of architecture finishes, it was contended by the plaintiff that contemporaneous documents P25 (pp 313–314, ACOB) and P23 (pp 315–320, ACOB) showed that there was variation to the architecture finishes, re-upgrading of architecture finishes. The plaintiff's claimed variation amount of RM4,518.66 which was accepted by conduct of the defendant. At the trial, the plaintiff had testified to this amount of variation, but the defendant did not give evidence as to the reasonable amount for this variation.

[11] Therefore, it was submitted by the plaintiff that evidence showed that on the balance of probabilities the plaintiff had been successful in proving the variation amounts as follows:

	RM
(a) Original site office subcontract sum	185,000
(b) Additional/variation works:	
(1) Change from timber windows to aluminum windows	2,894.11
(2) Change of terrazzo floor tiles to porcelain granite tiles	56,524.30
(3) Mild steel gate (backyard)	960

(4) Additional septic tank	2,200
(5) Additional electrical and external water supply works	13,405
(6) Upgrading of architectural finishes	4,518.66
Total	265,502.07

[12] Since it was not disputed that the total amount of monies paid by the defendant to the plaintiff in respect of the site office subcontract was RM168,000, it was submitted by the plaintiff that the unpaid balance value of works executed by the plaintiff is calculated as follows:

Total value of executed works – Total amount paid
(inclusive of variations)
RM265,502.07 – RM168,000
= RM97,502.07

[13] The defendant purported to set off two items in respect of the site office subcontract. They were:

(a) Alleged cost of building materials paid on behalf of the Plaintiff – RM24,263.41
(but not pleaded)
(b) Alleged cleaning works (pleaded) – RM10,000
Total RM34,263.41

[14] It was submitted that, in respect of item a, for alleged cost of building materials paid on behalf of the plaintiff, as it was not pleaded by the defendant, no documentary evidence of the alleged cost of building materials was adduced by the defendant, no evidence as to what types of materials and how much materials, and when the alleged payment made, it was non-recoverable.

[15] As for item (b), for alleged cleaning works, DW1 in Q&A 16 of his witness statement (p 116, ACOB) stated that Global Season was employed by the defendant for the cleaning up work at the site office. It was submitted that there was no evidence to prove what and why was the cleaning-up was required. There was no evidence to prove that the alleged cleaning-up was within the plaintiff's scope of subcontract works and therefore on the balance of probabilities this item should not be allowed to be set off. During submission before us, however, learned counsel for the plaintiff was prepared to concede this item in favour of the defendant.

[16] That being the case, it was submitted by the plaintiff that the nett balance unpaid amount which the plaintiff is entitled to recover from the defendant in respect of the site office subcontract is RM97,502.07 – RM10,000 = RM87,502.07.

Our decision

[17] We have carefully read the parties' submission and perused, the documentary evidence, the grounds of judgment of the learned High Court judge, the relevant witness statements and pleadings of the parties. We have set out in detail the submissions of the plaintiff under this head of claim in respect of the site office subcontract in order to show the legal reasoning of the plaintiff as well as our agreement with its legal reasoning. We can do no better than that as submitted by the plaintiff, as we agree that the learned High Court judge had clearly erred when he totally dismissed the plaintiff's claim and allowed the defendant's counterclaim of RM10,000 in respect of the site office subcontract. We find that the learned High Court judge had misapprehended the pleadings and the evidence adduced, had failed to appreciate and consider the evidence and had made an erroneous decision which was inconsistent with the contemporaneous, unchallenged documentary evidence and which also had contradicted the defendant's own admission/concession.

[18] Other than matters already alluded to before this, which showed the error of the learned High Court judge in appreciating the evidence adduced by the parties, we take note that the learned High Court judge had also clearly erred when he dismissed the plaintiff's claim in respect of the site office and allowed the defendant's counterclaim of RM10,000 in respect of the same when DW1, Dato' How Pooi Gen (who was the project director of the defendant) himself had in his witness statement (Q&A 17, p 116 ACOB) explained his version of final account for the site office subcontract as follows:

	RM
Total gross value of works done by the defendant	207,945.29
Less total amount paid to the plaintiff	(168,000)
	39,945.29
Less alleged cost of building materials paid on behalf (not pleaded)	(24,263.41)
Less alleged cleaning works (pleaded)	(10,000)
Balance amount owing to the plaintiff	5,681.88

[19] In Q&A 18 of his witness statement (p 117, ACOB) DW1 admitted

that:

> For the second contract (that is, the Site Office Subcontract) after taking account into consideration of all factors, *the amount owing to Plaintiff is RM5,681.88*. (Emphasis added.)

[20] We therefore are of the view that this is a case where appellate intervention is required and we do so. We therefore set aside the order of the High Court in respect of the site office subcontract and substitute it with the order that the defendant is required to pay the plaintiff the sum of RM87,502.07 after taking into account the counterclaim of RM10,000 (which is maintained).

Earthworks subcontract

[21] In the earthworks subcontract, the original subcontract sum was RM15,755 (see cl 1.1, earthworks subcontract, p 253, ACOB).

[22] The description of the earthworks is as summarised in item 1, Appendix 1 of the subcontract (p 257, ACOB) as follows:

> Cut and Fill to platform level, transport and remove excavated materials where directed within the site to make up levels, deposit, spread, leveled, well rammed and consolidated in 150mm layers to the approval of the S.O. where directed including forming embankments and slope formation.

It was the plaintiff's contention that what the description meant was for the earthworks to involve the cutting and filling works to be executed within the site and did not cover transporting of earth out of the site. It was testified by PW5, Johnson Lee (who is the managing director of the plaintiff) (at p 103, ACOB), that the cut and fill of earth under the earthworks subcontract was evenly balanced and the plaintiff did not have any surplus earth to be transported out of the Port Dickson Polytechnic site.

[23] The transporting of excess earth out of the site to contractor's own dump was a separate and different item of works in the defendant's main contract with the government/JKR but was not included in the plaintiff's scope of earthworks subcontract. This could be seen in the final account between the government/JKR and the defendant, exh P73 ('the final account') at p 440, ACOB, item B where it was stated 'Excavate and transport surplus excavated materials off the site to Contractor's own dump'. Whereas the plaintiff's subcontract earthworks description was reflected in item C, at p 439, ACOB, of the final account. That being the case, it was the plaintiff's contention that item C of the final account had certified the total final quantity of cut and fill earthworks by the plaintiff as 169,214 cubic meters. Moreover, the government's consultant quantity surveyor PW7, Aziz Mohamed, had

testified, in respect of this total and final quantity of cut and fill earthworks, that as far he knew, the plaintiff was the only subcontractor who executed this item (p 185, ACOB).

[24] It was common ground that both parties had subsequently agreed to the revised rates of earthworks as follows:

RM2.30 per cubic meter for first 30,000 cubic meters; and

RM1.80 per cubic meter for further quantity in excess of 30,000 cubic meters.

[25] Based on the agreed revised rates and total quantity of 169,214 cubic meters, it was contended by the plaintiff that the total value of the plaintiff's earthworks under the earthwork subcontract was as follows:

(a) for the first 30,000 cubic meters:

RM2.30 per cubic meter x 30,000 cubic meters = RM69,000

(b) for the balance quantity of 169,214 cubic meters (169,214 m[b3] – 30,000 m[b3] = 139,214 m[b3])

RM1.80 per cubic meter x 139,214 cubic meters = RM250,585.20

Total value of earthworks executed by plaintiff was RM69,000 + RM 250,588.20 = RM319,585.20

[26] As the defendant had paid the plaintiff in respect of the earthworks subcontract the total sum of RM61,000, the unpaid balance value of earthworks executed by the plaintiff is calculated as follows:

RM319,585.20 – RM61,000 = RM258,585.20

[27] With regard to the defendant's version that the total quantity of earthworks executed by the plaintiff was only 65,075 cubic meters, it was submitted by the plaintiff that the defendant's version was contrary to the final account (P73) which contained the government/JKR's certification and the defendant's admission of the total final quantity of cut and fill earthworks at 169,214 cubic meters, which was confirmed by PW7. The defendant had relied on JKR's interim valuation as at 30 July 2002 of 65,075 cubic meters. It was the plaintiff's submission that this reliance was erroneous. PW7 had testified that his interim valuation was a temporary quantity by brief check during monthly site visit, at interim stages where he did not know about the variations instructed and the additional/variation quantities would only be fully captured in the final account measurement (p 199, lines 34–37; p 200 lines 1–37, ACOB)

Our decision

[28] Having perused the relevant documents/exhibits, testimonies of the relevant witnesses and submissions of the parties, we once again have to agree with the submissions of the plaintiff in respect of the earthworks subcontract. The learned High Court judge had failed to appreciate and consider the evidence adduced, in particular exh P73, the final account. For if he had done so he would have clearly seen that the earthworks executed by the plaintiff (as there were no other subcontractor doing this earthworks according to PW5 and PW7) under item C of the final account was 169,214 cubic meters and not, as contended by the defendant, 65,075 cubic meters. We generally accept the submission of the plaintiff. Accordingly we allow the plaintiff's claim under this head of claim and set aside the order of the learned High Court judge to that extent. We hold that the defendant is required to pay the plaintiff the sum of RM258,585.20 as being the unpaid balance value of earthworks executed by the plaintiff under the earthworks subcontract.

[29] We further note that the learned High Court judge had clearly erred when he dismissed the plaintiff's claim under this head of claim. This is because even if the defendant's version had been accepted by us (which we do not), that the plaintiff had only executed for 65,075 cubic meters of earthworks, this would mean that the total value of earthworks for 65,075 cubic meters was RM132,135 calculated as follows:

RM2.30 per cubic meter x 30,000 cubic meters	=	RM69,000
RM1.80 per cubic meter x 35,075 cubic meters	=	RM63,135
Total	=	RM132,135

As the amount paid by the defendant to the plaintiff for the earthworks was RM61,000 there would still remain an unpaid balance value of earthworks executed by the plaintiff in the sum of RM71,135 calculated as follows:

RM132,135 – RM61,000 = RM71,135

THE DEFENDANT'S COUNTERCLAIMS

Alleged outstanding earthworks within the plaintiff's scope of works

[30] The defendant alleged that there was 104,139 cubic meters of outstanding balance earthworks left undone by the plaintiff. It was the plaintiff's position that this allegation was contradictory to the defendant's letter dated 11 September 2002 (D38, pp 290–291, ACOB) read together

with plaintiff's letter dated 10 September 2002 (P20, pp 285–288, ACOB) where it showed the defendant's complaint was in respect of three items of earthwork left not done namely:

(a) slope to trim (as shown in plan on p 286, ACOB);

(b) part of road formation level to top up (as shown in plan on p 287, ACOB); and

(c) double slope to trim (as shown in plan on p 288, ACOB).

[31] It was the plaintiff's contention that these three items of balance earthworks was nowhere comparable to the defendant's version that 104,139 cubic meters of balance earthworks were left undone by the plaintiff. In any case, it was the plaintiff's stance that these 'minor' balance items were executed by the plaintiff and that there was no outstanding earthworks within the plaintiff's scope of works. The plaintiff's witnesses, (PW1's (Yap Wei Ling) witness statement, Q&A 4, p 76, ACOB; PW4's (Pan Keat Leong) witness statement, Q&A 5, p 78, ACOB) had testified that the earthworks platforms were completed but that the defendant kept changing the platform levels from time to time. This evidence remained unrebutted.

[32] Moreover, it was the plaintiff's contention that the details of the items awarded to another subcontractor, known as Rantau Seraya Sdn Bhd ('Rantau Seraya') to allegedly execute outstanding balance earthworks of the plaintiffs were different in type and description ofworks from those complained of by the defendant in September 2002; the earthworks were at different locations from those complained by the defendant in September 2002; the alleged items of works awarded to Rantau Seraya were executed between March 2003 and July 2003, many months after the plaintiff had left the site (and yet there was not a single letter of complaint from the government/JKR regarding the alleged outstanding items); the quantities of the items allegedly outstanding balance work complained by the defendant in September 2002 could not possibly account for the huge difference between the government/JKR's certified final quantity of earthworks in the final account of 169,214 cubic meters and the defendant's version of 65,075 cubic meters allegedly being the total quantity of earthworks executed by the plaintiff.

[33] Further, it was submitted that under the earthworks subcontract, cl 8 (Standard Terms and Conditions, Appendix II, p 260, ACOB), all variations must be in writing before the plaintiff had the obligation to execute it. In the present suit, there was no written instruction by the defendant to order the plaintiff to execute the items of works described in pp 365–366, ACOB. As such, there was no obligation on the plaintiff's part to execute these variations beyond the original contract quantity. Therefore the plaintiff was not in breach

of any obligation in respect of these items, and the defendant was not entitled to recover any loss or damage arising therefrom. The plaintiff cited Chow Kok Fong, *Law and Practice of Construction Contracts* (3rd Ed, 2004, pp 178–186) as its authority for this proposition. In any event, where the work is outside the scope of the subcontract, the subcontractor is entitled to refuse to carry it out despite instructions from the employer/main contractor. The plaintiff cited *Hudson's Building and Engineering Contracts*, (11th Ed), Vol 1, pp 929–939, as its authority on this proposition.

Our decision

[34] Following on our finding that, based in particular on exh P73, the final account, the plaintiff had executed the earthworks under item C of the same to the amount of 169,214 cubic meters in respect of the earthworks subcontract, this must necessarily mean that the plaintiff had completely executed the earthworks as per the earthworks subcontract. We also agree with the plaintiff's submission that cl 8 of the earthworks subcontract requires any variation ordered must be in writing and since there was no written instructions by the defendant to order the plaintiff to execute the items of works described in pp 365–366, ACOB, there was no obligation on the plaintiff's part to execute the variations beyond the subcontract based on the authorities cited. It appear to us that the learned High Court judge had failed to appreciate the facts as alluded to by the plaintiff and in failing to do so he had misdirected himself to such an extent as to find that the defendant's counterclaim was valid and had allowed it.

[35] The learned High Court judge had further misdirected himself when he allowed the defendant's counterclaim by awarding the gross amount of costs of getting another subcontractor (Rantau Seraya) to execute the so-called balance works as the alleged loss or damage whereas it should have been calculated as follows:

> Actual costs of getting another subcontractor to execute the balance works – Payable value of balance works if executed by the original subcontractor
>
> = Loss of damages for breach of contract to execute balance works

See *Guobena Sdn Bhd v New Civilbuild Pte Ltd* [2002] 3 SLR 533 (Singapore Court of Appeal) where it was held that:

> A basic principle in contract law, based on the concept of *restitutio in integrum*, is that an aggrieved party is entitled to claim as damages the losses or additional expenses which he has to incur to get what he has contracted to obtain from the party in breach and not give him any gain beyond such loss. To determine the loss which the appellant had suffered on account of the stoppage of work by the respondent, it was only that portion exceeding the contract sum which the appellant

had incurred (if any) to complete the works that the appellant would be entitled to claim as damages ....

[36] In the premises, we agree with the submission of the plaintiff that as the plaintiff had completed the earthworks under the earthworks subcontract, and that the so-called balance works allegedly not done by the plaintiff were different from that complained by the defendant in terms of type, description, location and quantity, there can be no counterclaim under this head by the defendant against the plaintiff. We, therefore, set aside the learned High Court judge's order under this item for the amount of RM295,840.

Alleged removal of construction debris and works and/or earth

[37] Another counterclaim item by the defendant against the plaintiff was in respect of the alleged removal of construction debris and wastes and/or earth from neighboring owner Matrix Concept's land which the defendant alleged was dumped by the plaintiff onto Matrix Concept's land. The defendant alleged that it had to engage Rantau Seraya to remove 41,220 cubic meters of earth at an alleged total gross costs of RM370,980 and the defendant had counterclaimed this amount against the plaintiff.

[38] It was the plaintiff's case that, vide its witness testimony PW5 (Q&A 33 p 103, ACOB), the cut and fill earthworks under the plaintiff's earthworks subcontract was an evenly balanced cut and fill earthworks without any excess or surplus earth to be transported out of the site. This fact was corroborated by the following documentary evidence:

(a) earthworks subcontract document, item 1, Appendix 1 (p 253, ACOB) which stipulated 'Cut and Fill to platform level, transport and remove excavated materials where directed within site ...';

(b) this was contrasted with the defendant's main contract and the final account with the government/JKR where there was a specific separate and different item for transporting earth away from site to the contractor's dumping ground (see exh P73, p 440, ACOB, item B): 'Excavate and transport surplus excavated materials off the site to Contractor's own dump – Final quantity 1020m x RM9 = RM9,180'. This showed there was only a very small quantity of 1,020 cubic meters of excavated earth was transported out of the site in the defendant's main contract for the same project;

(c) in the plaintiff's progress claims, there were no claim for transporting any surplus earth off the site to contractor's own dumping ground. In progress claim No 5 (Final) (exh P31, pp 346–347, ACOB), the plaintiff did not make such a claim and it was submitted that if there was such transportation of substantial quantity of earth done by the plaintiff, the

plaintiff would have submitted its claim for it seeing that the rate for the transportation was, at RM9 per cubic meter, much higher; and

(d) the defendant did not instruct the plaintiff to execute any work on transporting out of the site and did not certify nor paid the plaintiff for any work on transported excavated earth out of the site (see defendant's payment certificates pp 263–267, ACOB).

[39] In any case, vide the defendant's letter dated 17 July 2003, to the plaintiff (exh D5, p 342, ACOB), third paragraph, the defendant complained that '... earth dumping at the back ... encroach inside other people land by five meter or more'. The defendant instructed the plaintiff '... to cut down the earth level on the left hand site and dozed it toward the right hand site, which is Polytheniktecnic land'. In contrast, the alleged excess earth which the defendant purportedly employed Rantau Seraya to remove from Matrix Concept's land involved an encroachment of 65 meters (see D78, pp 367–368, ACOB). Also in contrast was Matrix Concept's letter of complaint dated 6 August 2003 (see pp 372–374, ACOB) with regard to the presence of construction debris and waste over an area covering six rows of housing plots.

[40] It was submitted seeing that:

(a) that defendant had complained that the plaintiff had demobilised from the site on or before 8 July 2002 (exh D60, p 282, ACOB);

(b) the defendant contended that it had demobolised the greater majority of machinery which were idling because there was no balance of works left in July 2002;

(c) the defendant's complaint letter dated 17 July 2002 where the encroachment by the plaintiff was said to be about five meters; and

(d) the photographs attached to Matrix Concept's letter of complaint dated 6 August 2003 (about 13 months after the plaintiff had demobilised all of its machineries except one bulldozer from the site in July 2002 and about eight months after the plaintiff completely demobilised from the site in December 2002) showed that as at or about early August 2003, the trucks were still dumping debris and wastes at Matrix Concept's neighbouring land;

the Matrix Concept's complaint of construction debris and wastes covering six rows of housing plots could not be the excess earth dumped by the plaintiff, that is, that the 65 meters of encroachment could not be caused by the plaintiff and the said photographs showed that the construction debris and wastes at Matrix Concept's land were dumped by other subcontractors after the plaintiff left the site.

[41] Further, it was submitted that if the plaintiff had dumped such huge quantities of earth, debris and wastes over an extensive area on Matrix Concept's land in or before July 2002, it was highly improbable for the defendant to overlook it and not send more letters of complaint to the plaintiff, especially seeing that a letter of complaint was sent to the plaintiff by the defendant on the five meters of encroachment in July 2002. In the circumstances, it was submitted that there were overwhelming evidence in the contemporaneous documents which point to the fact that the plaintiff did not transport the alleged 41,220 cubic meters of earth out of the Polytechnic site to dump them on Matrix Concept land.

Our decision

[42] After perusing carefully all the contemporaneous documentary evidence tendered in court and the testimonies of witnesses, we once again agree with the submissions of learned counsel for the plaintiff that there are overwhelming evidence which point to the fact that the plaintiff could not have transported 41,220 cubic meters of earth out of the Polytechnic site and dump them on Matrix Concept land. We find once again that the learned High Court judge had failed to fully appreciate the evidence tendered in court. Since the findings of facts by the learned judge were based on the same documentary evidence as alluded to by the plaintiff before us, we find that there is no danger of us making findings of facts which differed from the learned High Court judge. For the reasons stated by the plaintiff, we agree that the learned High Court judge was wrong to have allowed the defendant's counterclaim under this head of claim for RM370,980. We therefore set aside the learned High Court judge's order under this item for the amount of RM370,980.

[43] As in the case of the alleged outstanding earthworks referred to in paras 30–36 above, and if we agree with the learned High Court judge (which we do not) that the defendant is entitled to his counterclaim, we also find that the learned High Court judge had erred in awarding the defendant the gross amount of the alleged removal of excess earth from Matrix Concept's land. The learned High Court judge ought to have proceeded to find and assess the value of the plaintiff's works on the excavation and transporting out the excess earth of 41,220 cubic meters and to award it to the plaintiff as value of such works done, and then set off against the defendant's contract rate with the government/JKR for earth excavation and transporting out of the site at RM9 per cubic meter being the alleged total gross value of removal works said to be executed by Rantau Seraya. This was not done by the learned High Court judge.

CONCLUSION

[44] For the reasons stated above, we unanimously allow the plaintiff's appeal with costs of RM60,000 here and below. We set aside the High Court order dated 16 January 2013 and in substitution we make the following order:

(a) we allow the plaintiff's claim:

(i) in respect of the site office subcontract, the sum of RM87,502.07 shall be paid by the defendant to the plaintiff;

(ii) in respect of the earthworks subcontract, the sum of RM258,585.20 shall be paid by the defendant to the plaintiff; and

(iii) interests on the amounts in sub-paras (i) and (ii) above at the rate of 5%pa from date of accrual (1 October 2002) until date of full realisation; and

(b) we allow the defendant's counterclaim of RM10,000 in respect of the site office subcontract (which has been taken into account in para 44(a)(i)) and dismiss the defendant's counterclaim of RM666,820 (RM295,840 + RM370,980) in respect of the earthworks subcontract.

[45] We allow this appeal in full awareness of the principles of law pertaining to the appellate powers of the court. We note the following cases as cited by the parties:

(a) *Aseambankers Malaysia Bhd & Ors v Shencourt Sdn Bhd & Anor* [2014] 4 MLJ 619; [2014] 2 CLJ 773 (CA);

(b) *Tan Kuan Yau v Suhindrimani* [1985] 2 MLJ 22 (SC);

(c) *Choo Kok Beng v Choo Kok Hoe & Ors* [1984] 2 MLJ 165b (PC);

(d) *Chow Yee Wah & Anor v Choo Ah Pat* [1978] 2 MLJ 41b (PC); and

(e) *Ming Holdings (M) Sdn Bhd v Tuan Syed Azahari bin Noh Shahabudin & Anor* [2010] 4 MLJ 577 (FC).

Plaintiff's appeal allowed with costs.

Reported by Kanesh Sundrum